IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SHAWNA MORIARITY, Plaintiff	:	NO. 11 - 01,036
	:	CIVIL ACTION - LAW
vs.	:	
WILLIAMSPORT HOSPITAL AND MEDICAL CENTER, WILLIAMSPORT REGIONAL MEDICAL CENTER FAMILY MEDICINE RESIDENCY PROGRAM, SUSQUEHANNA REGIONAL HEALTHCARE ALLIANCE, SUSQUEHANNA HEALTH MEDICAL GROUP, TIMOTHY HEILMANN, M.D., DOUGLAS CHARLES, D.O., and SUSQUEHANNA HEALTH SYSTEMS, INC., Defendants	:	Motion in Limine

OPINION AND ORDER

Before the court is Plaintiff's Motion in Limine to Exclude Evidence of Decedent's Alleged Antecedent Conduct Prior to the June 26, 2009, Negligence of Defendants Dr. Charles and Dr. Heilmann as Irrelevant Under Pa.R.E. 401, 402 and 403, filed September 13, 2013. Argument on the motion was heard November 21, 2013.

In her Fourth Amended Complaint, Plaintiff asserts various claims of negligence against two individual physicians, Dr. Charles and Dr. Heilmann, and claims of vicarious liability and corporate negligence against the corporate defendants. The claims revolve around decedent's care by Dr. Charles, a third year resident, as supervised by Dr. Heilmann, and an alleged delayed diagnosis and treatment of a subdural hematoma. In the instant motion, Plaintiff seeks to exclude evidence of the decedent's prior alcohol use, evidence of an ARD, evidence of the decedent having smelled like alcohol and evidence of the decedent allegedly having wrecked a motorcycle.[1] The motorcycle issue was addressed in response to a motion in limine seeking to preclude certain testimony by Dr. Haines, and will not be addressed further herein. The drug and alcohol issues will be addressed in turn.

Plaintiff argues that evidence of the decedent's alcohol use is irrelevant to the assessment of comparative fault, citing Richardson v. LaBuz, 474 A.2d 1181 (Pa. Commw.

[1] In her brief and at argument, Plaintiff also asked the court to exclude evidence that the decedent had marijuana in his system at the time of his death. As the marijuana use reference in expert reports is the subject of a separate motion in limine, the court will defer discussion of that issue to that motion.

1984). Defendants do not seek to introduce the evidence in support of a claim of comparative negligence, however, but, rather, in support of their expert's opinion that alcohol use had an effect on Decedent's life expectancy. As life expectancy is at issue here, evidence of factors which impact such is relevant. See Kraus v. Taylor, 710 A.2d 1142, 1144 (Pa. Super. 1998)("Evidence of appellant's chronic drug and alcohol abuse strongly suggests that his life expectancy deviates from the average.") Defendants' expert opines that "[t]he patient's heavy drinking and smoking plus the fact that he was on Coumadin at high doses and has an aortic valve replacement means that the patient's life expectancy was not normal …." Thus, as long as the evidence is not otherwise inadmissible, the court will not exclude it on this basis.

Plaintiff seeks specifically to exclude evidence that the decedent drank six to eight beers on May 30, 2009, the date he injured himself (which injury apparently led to the subdural hematoma that ultimately caused his death). This evidence would support the defense claim that the decedent engaged in "heavy drinking", one of the facts relied upon by the defense expert, and is therefore relevant. It is noted that there are various notes in the medical records which also support the claim that the decedent had a history of alcohol use, and, in fact, the evidence of the drinking of six to eight beers comes from a medical record. As all of this evidence together raises a reasonable inference that the decedent did have a history of alcohol use, its probative value outweighs the prejudicial effect and it will therefore be admitted.

Plaintiff also seeks specifically to exclude evidence that the decedent was accepted into an Accelerated Rehabilitative Disposition program in 2005, as an alternative to being convicted or pleading guilty to a DUI. Although Plaintiff contends such evidence is not admissible under Pa.R.E. 410, such rule speaks to statements made by a defendant during an ARD proceeding, and not the fact of the ARD itself.[2] As the court pointed out in DeNillo v, DeNillo, 535 A.2d 200, 202 (Pa. Super. 1987), "successful completion of ARD is not equivalent to a finding of innocence." The Court therefore allowed evidence of the father's criminal charges even though disposed of through an ARD, in a custody dispute where the issue was the child's best interest, holding that "in certain circumstances consideration may be given to an individual's

[2] Rule 410 prohibits use of evidence of a guilty plea that was later withdrawn, a plea of no contest, and statements made in the course of ARD proceedings and guilty plea proceedings. Had the legislature wished to exclude evidence of the ARD itself, it could easily have listed such with the guilty plea that was later withdrawn and the plea of no contest. Apparently, the legislature recognized the significance of an ARD proceeding, equating it to a plea which is *not* withdrawn.

participation in an ARD program." Id. In the instant case, evidence of the decedent's participation in an ARD program for DUI charges in 2005 is relevant to the defense claim that he had a history of alcohol use. The criminal element of the evidence makes the evidence more prejudicial than probative, however, and unless Plaintiff contests the defense position that the decedent had a history of alcohol use, such will not be admitted on that basis.[3]

Finally, Plaintiff seeks specifically to exclude as hearsay the testimony of Linda Waltz, the Human Resources Manager at the decedent's place of employment, that several co-workers had told her that they had smelled alcohol on the decedent's person. Defendants contend such statements are admissible under the "present sense impression" exception of the hearsay rule. Inasmuch as the court cannot find that the statements were made to Ms. Waltz while the declarants were perceiving the condition or immediately thereafter, however, such cannot be classified as present sense impressions and thus will not be admitted.[4]

ORDER

AND NOW, this 3rd day of November 2013, for the foregoing reasons, Plaintiff's Motion in Limine to Exclude Evidence of Decedent's Alleged Antecedent Conduct Prior to the June 26, 2009, Negligence of Defendants Dr. Charles and Dr. Heilmann as Irrelevant Under Pa.R.E. 401, 402 and 403 is GRANTED in part and DENIED in part, as detailed above.

BY THE COURT,

cc: Michael Foley, Esq.
600 Linden Street, Scranton, PA 18501
Richard Schluter, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

Dudley N. Anderson, Judge

[3] If Plaintiff contests the defense claim of alcohol use, the probative value of the ARD increases and would at that point outweigh its prejudicial effect. If there is no contest, the evidence is merely cumulative.

[4] The transcript of Ms. Waltz testimony does not establish that the observations of the co-workers were stated to her while the co-workers were perceiving the odor of alcohol or immediately thereafter. Ms. Waltz also testified that she herself smelled alcohol on him, and that testimony will be admissible in the event Plaintiff contests the defense position regarding the decedent's alcohol use. Again, in the event of a contest of the issue, the probative value increases to the extent that it outweighs the prejudicial effect.